

\*\*E-Filed 6/30/09\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

KENNETH B. QUANSAH, JR.,

Plaintiff.

v.

7-ELEVEN STORE #25561 (JAY MOUSAVI,  
SADU SINGH), et al.,

Defendants.

Case Number C 08-1012 JF (HRL)

ORDER<sup>1</sup> DENYING MOTION FOR  
RELIEF FROM JUDGMENT

[Re: Docket No. 30]

Plaintiff Kenneth B. Quansah, Jr. ("Plaintiff"), a frequent litigant in this Court<sup>2</sup>, seeks relief from the order and judgment dismissing the instant action for lack of prosecution. For the reasons discussed below, the motion will be denied.

**I. DISCUSSION**

Plaintiff filed the instant action on February 20, 2008, alleging multiple employment-related claims and requesting leave to proceed *in forma pauperis*. The court issued a scheduling

<sup>1</sup> This disposition is not designated for publication in the official reports.

<sup>2</sup> A search of the Court's electronic filing system shows that Plaintiff has filed 12 actions in the Northern District of California since 1993.

1 order setting a case management conference for June 20, 2008. On April 2, 2008, the Court  
 2 denied Plaintiff's application to proceed *in forma pauperis*, finding that the supporting papers  
 3 were incomplete but granting Plaintiff leave to file an amended application. On April 15, 2008,  
 4 Plaintiff filed a second application to proceed *in forma pauperis*. The Court granted the  
 5 application on May 27, 2008.<sup>3</sup>

6 Although Plaintiff now contends that his submission of a second application for leave to  
 7 proceed *in forma pauperis* necessitated the re-scheduling of the initial case management  
 8 conference, it is undisputed that Plaintiff failed to appear at the conference scheduled for June 20,  
 9 2008. Accordingly, June 25, 2008, the Court ordered Plaintiff to show cause why the action  
 10 should not be dismissed for lack of prosecution, instructing Plaintiff to file any response by July  
 11 15, 2008 and setting a hearing for July 25, 2008. The record reflects that a copy of the order to  
 12 show cause was sent to Plaintiff's post office box, where Plaintiff received and later continued  
 13 to receive communications from the Court. Plaintiff nonetheless claims that he never received  
 14 the order to show cause.

15 On July 14, 2008, Defendant 7-Eleven Store filed an answer, and Defendant 7-Eleven  
 16 Corporation filed a motion to dismiss. On July 25, 2008, Plaintiff failed to appear at the hearing  
 17 on the order to show cause, and the Court dismissed the instant action without prejudice for lack  
 18 of prosecution. Plaintiff claims that on or about the same date, he sought but was denied a new  
 19 scheduling order from the Clerk's office. Plaintiff thereafter filed several procedurally improper  
 20 motions attempting to revive his case, and in response to each motion, the Court directed  
 21 Plaintiff to Fed. R. Civ. P. 60(b). Plaintiff filed the instant motion on February 24, 2009.

## 22 II. LEGAL STANDARD

23 The Federal Rules of Civil Procedure allow relief from judgment on the grounds of "(1)  
 24 mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason that justifies  
 25 relief." Fed. R. Civ. P. 60(b). A motion for relief for excusable neglect must be made "not more  
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27 <sup>3</sup> Plaintiff believes that his decision to re-file his application to proceed *in forma pauperis*  
 28 caused the U.S. Marshals Service to not serve the complaint. However, as noted below,  
 Defendants responded to the complaint and thus appeared in the instant action.

1 than one year after the judgment, order, or proceeding was entered or taken.” *Id.*

2 The disposition of a Rule 60(b) motion is a matter “which lies largely within the  
3 discretion of the district court.” *Provident Sec. Life Ins. Co. v. Gorsuch*, 323 F.2d 839, 842 (9th  
4 Cir. 1963). “Rule 60(b) is remedial in nature and therefore must be liberally applied . . .  
5 Whenever it is reasonably possible, cases should be decided upon their merits.” *Pena v. Seguros*  
6 *La Comercial, S.A.*, 770 F.2d 811, 815 (9th Cir. 1985) (internal citations omitted). Failure by the  
7 movant to cite the applicable standards does not relieve the district court of its duty to apply the  
8 correct legal standard. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000).

9 The term “excusable neglect” in Rule 60(b)(1) generally should be read consistent with  
10 its meaning in the bankruptcy context, meaning that applicable bankruptcy precedent is relevant.  
11 *See Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997). In evaluating whether  
12 the particular neglect was excusable, the Court must consider “the danger of prejudice to the  
13 [other party], the length of the delay and its potential impact on judicial proceedings, the reason  
14 for the delay, including whether it was within the reasonable control of the movant, and whether  
15 the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507  
16 U.S. 380, 395 (1993).

17 Pursuant to Rule 60(b)(6), a party is entitled to relief if he demonstrates “extraordinary  
18 circumstances which prevented or rendered him unable to prosecute [his case].” *Pioneer*, 507  
19 U.S. at 393. The “excusable neglect” and “any other reason” provisions are mutually exclusive:  
20 “The ‘excusable neglect’ clause is interpreted as encompassing errors made due to the ‘mere  
21 neglect’ of the petitioner whereas (b)(6) is intended to encompass errors or actions beyond the  
22 petitioner's control.” *Community Dental Services v Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002)

### 23 III. DISCUSSION

24 Plaintiff’s motion for relief is timely because it was filed within one year of the entry of  
25 judgment. The Court therefore turns to the issue of whether Plaintiff is entitled to relief pursuant  
26 to subsection (b)(1) or (b)(6) of Rule 60(b).

#### 27 A. Rule 60(b)(6)

28 Plaintiff’s alleged non-receipt of the order to show cause must be analyzed under

1 subsection (b)(6), because if indeed he did not receive the order, such non-receipt was a factor  
2 beyond his control rather than a product of negligence on his part. However, there is a  
3 rebuttable presumption that if a document was mailed, the addressee received it. If there is  
4 sufficient evidence to raise the presumption, the burden shifts to the receiving party to show that  
5 the document never arrived. *Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001).

6 Official court records show that the order to show cause was mailed to Plaintiff's address  
7 of record, which is enough to raise the applicable presumption. It is not sufficient for the  
8 plaintiff merely to state that the document never was received. *Id.* Plaintiff presents no other  
9 evidence, circumstantial or otherwise, that he did not receive the order. Particularly in light of  
10 the fact that Plaintiff apparently received all other correspondence from the Court at the same  
11 post office box both before and after his alleged non-receipt of the order to show cause, it must  
12 be presumed that Plaintiff received the order.

13 **B. Rule 60(b)(1)**

14 Since Plaintiff must be presumed to have received the order, his claim for relief turns on  
15 his success in demonstrating "excusable neglect" under 60(b)(1). While Plaintiff does not  
16 specify any excuse—he relies entirely on his purported non-receipt of the order—he implies that  
17 there was confusion regarding the need for a new case management schedule. However, Plaintiff  
18 offers no explanation for his belief that the granting of his second application to proceed *in forma*  
19 *pauperis* invalidated the existing schedule. Moreover, the order setting the hearing on the order  
20 to show cause was issued a month after Plaintiff's second application to proceed *in forma*  
21 *pauperis* was granted. Even if Plaintiff believed that the existing schedule had been superseded,  
22 any subsequent scheduling, such as the setting of the hearing, already would have taken this into  
23 account. It was entirely within Plaintiff's reasonable control whether to appear at the hearing. It  
24 also was within Plaintiff's reasonable control to comply with the Court's subsequent directive to  
25 seek relief under Fed. R. Civ. P. 60(b) rather than by filing other, improper requests for relief.  
26 Defendants would suffer substantial prejudice if required to appear in a case that was dismissed  
27 nearly a year ago. Accordingly, the Court concludes that Plaintiff's neglect was not excusable.

**IV. ORDER**

Good cause therefor appearing, the motion for relief from judgment is DENIED.

IT IS SO ORDERED.

DATED: 6/29/09

  
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JEREMY FOGEL  
United States District Judge

Copies of Order served on:

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